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CURRENT TOPICS.

Last week the Senate passed the Court of Appeals bill for the relief of the Supreme Court of the United States, being the measure commonly known as Senator Davis' bill, and embodying substantially the same provisions as those recommended in the report, of recent date, of the majority of the select committee of the American Bar Association. Its cardinal features are: 1. The establishment in each circuit of an intermediate appellate court, to consist of the circuit justice, the circuit judge, two additional circuit judges, having the same jurisdiction and compensation as the present circuit judges, and two of the district judges to be designated in rotation, four judges to constitute a quorum. 2. To this court, appeals and writs of error will lie from any final judgment or decree of any circuit or district court, when the amount in controversy exceeds $500, and in other cases where an appeal, or writ of error now lies from such judgment or decree, or where the circuit or district judge shall certify that the adjudication involves a question of general importance. Thus the circuit court is relieved of its present appellate jurisdiction, but it is specially provided that its supervisory jurisdiction in bankruptcy cases shall remain untouched. 3. That the decision of the Court of Appeals, upon questions of fact shall in all cases be final and conclusive, except as otherwise provided in the act, the facts to be specially found if requested by either party, but a review upon the law may be had upon writ of error or appeal, in the manner now provided by law to the Supreme Court of the United States, from every final judgment or decree of the Court of Appeals where the matter in controversy exceeds the sum or value of $10,000, exclusive of costs, or where the adjudication involves a question upon the construction of the Constitution, or the construction or validity of a treaty or law of the United States, or where the court shall certify that the adjudication involves a legal question of sufficient importance to require that the final decision should be made by the Supreme Court. 4. The first terms of the Courts of Appeal are to be held on the first Tuesday in November, 1882, at Boston, New York, Philadelphia, Richmond, New Orleans, Cincinnati, Chicago, St. Louis and San Faancisco, and on the second Tuesdays in May and first Tuesdays in November, thereafter.

The view expressed by the minority report of the committee is opposed to the system of intermediate appellate courts, principally upon the ground of the necessity of a pecuniary limit upon the right of appeal involved therein, and of the effect upon the position of the Supreme Court itself in the way of the estrangement of popular feeling consequent upon the withdrawal of so large a share of its general jurisdiction, and it offers instead, the separation of the Supreme Court into three divisions, to each of which causes will be assigned without reference to their character. The advantages of the plan offered by the majority of the committee seem to us too obvious to require comment. Passing over minor considerations, an insuperable objection arises in the questionable constitutionality of such a separation. A triplicate Supreme Court, each division exercising the functions of a final tribunal in the cases disposed of by it, is not "one Supreme Court," within the fair and unrestrained meaning of the language of the Constitution. Furthermore, from the decisions of such a tribunal, it is evident that confusion in the principles of the law would result. No three benches of judges of coordinate and concurrent jurisdiction can by any sort of possibility avoid occasionally striking out divergent lines of precedents. The consequences of such a state of affairs, even to a limited degree in our Supreme Court precedents, would be intolerable. Another circumstance, which should have due weight with the members of both houses of Congress, is the opposition (well known in Washington) of most, if not all, of the justices of the Supreme Court to any plan involving a division of the court, and their belief that such a measure would be attended with objectionable results. Altogether, we earnestly hope that the measure passed by the Senate will meet with little difficulty in the lower house, and will soon become a law. The further objection urged in the minority

report of the committee of the American Bar Association on the score of expense, is simply ridiculous. The glaring inadequacy of the salaries of Federal judicial officers from the highest to the lowest, makes it impossible for the principle of public economy to be urged in connection with the judiciary with any sort of show of reason.

ESTATES BY CURTESY.

The common law which, in this respect, is unchanged in many of the States, gave the husband a certain interest in the land of his deceased wife, which was termed his estate by the curtesy. This estate arose, however, only upon the fulfillment of certain conditions, and not in every case in which the husband survived the wife. "There are," says Blackstone, "four requisites necessary to make a tenancy by the curtesy: marriage, seisin of the wife, issue, and death of the wife. 1 The marriage must be canonical and legal. 2. The seisin of the wife must be an actual seisin or possession of the lands: not a bare right to possess which is a seisin in law, but an actual possession which is a seisin in deed. And, therefore, a man shall not be tenant by the curtesy of a remainder or reversion. * * * * 3. The issue must be born alive, * * * * and such issue as is also capable of inheriting the mother's estate." [1] These four requisites for the existence of the estate need not necessarily be coincident in point of time. Says Lord Coke: "Four things belong to an estate of tenancy by the curtesy, *viz.*: marriage, seisin of the wife, issue, and the death of the wife. But it is not necessary that these should concur together all at one time; and therefore if man taketh a woman seised of lands in fee, and is disseised, and then have issue, and the wife die, he shall enter and hold by the curtesy. So if he have issue which dieth before the descent." [2]

The rule as stated by Blackstone above that the seizin of the wife must be the actual seizin and not a mere seizin in law, although perfectly accurate at common law,[3] and followed in a few of the American cases,[4] is not in accord with the current of authority at present in this country,[5] and, indeed, has sometimes been relaxed in England.[6] The foundation of the rule lies in the common-law maxim *seisina facit stipitem*; that the technicality of seisin, and not the actual ownership of the property, points out the line of descent. Hence, inasmuch as to enable the husband to be tenant by the curtesy, the wife must have such seisin as will enable her issue to inherit from her,[7] actual seisin in the wife was requisite to the husband's title as tenant by the curtesy.[8] But the general principle underlying the maxim *seisina facit stipitem* was early repudiated in this country as inapplicable to our systems of descents and transfers, and with it went its application to the estate by the curtesy.[9] Say the Missouri Supreme Court, in Reaume v. Chambers:[10] "Whatever may be the common law on the subject, the circumstances of the country demand a modification of the rule. * * * * Descents with us depend not on actual seisin, but on the statutes regulating descents, and we have allowed the conveyance of lands whilst in the adverse possession of others.[11] The wife's seisin in fact, then, being discarded as a test of the husband's right, it is not al-

[1] 2 Blk. Com. 127.

[2] 1 Inst. 30 *a*. See also Jackson v. Johnson, 5 Cow. 74 (15 Am. Dec. 433).

[3] See also Co. Litt. 29; Cruise's Dig. Tit. 5, ch. 1, sec. 1, pp. 159, 160.

[4] Stoddard v. Gibbs, 1 Sumn. 263, Adams v. Logan, 6 T. B. Mon. 179; Stinebaugh v. Wisdom, 13. B. Mon. 469; Petty v. Malier, 15 B. Mon. 591.

[5] Jackson v. Sellick, 8 Johns. 270; Adair v. Lott, 3 Hill, 182.

[6] De Grey v. Richardson, 3 Atk. 469; 1 Cruise Dig., 110, 111, 112.

[7] Cruise Dig., 112, s. 24.

[8] 2 Blk. Com. 127; Co. Litt. 39 *a*; Cruise Dig., 108, Tit. 5, ch. 1, sec. 10.

[9] Bush v. Bradley, 4 Day, 298; Hillhouse v. Chester, 3 Day, 166; Jackson v. Johnson, 5 Cow. 74 (15 Am. Dec. 433); Rabb v. Griffin, 26 Miss. 579; Adair v. Lott, 3 Hill, 182; Kline v. Beebe, 6 Conn. 494; Wass v. Buckman, 38 Me. 358; Merrill v. Horne, 5 Ohio St., 307; Buchanan v. Duncan, 40 Pa. St. 82; Borland v. Marshall, 2 Ohio St. 308. *Contra*—Stoddard v. Gibbs, 1 Sumn. 263; Adams v. Logan, 6 T. B. Mon. 179; Stinebaugh v. Wisdom, 13 B. Mon. 469; Petty v. Malier, 15 B. Mon. 591; Powell v. Gossum, 18 B. Mon. 192. Though in this last case the receipt of the rents and profits was deemed sufficient evidence of seisin in the wife to entitle her husband to curtesy.

[10] 22 Mo. 54, per SCOTT, J.; followed and approved in McKee v. Cottle, 6 Mo. App. 416; Harvey v. Wickham, 23 Mo. 112; Stephens v. Hume, 25 Mo. 349.

[11] See also McDaniel v. Grace, 15 Ark. 465; Davis v. Mason, 1 Pet. 503; Jackson v. Sellick, 8 Johns. 262; Barr v. Galloway, 1 McLean, 476.

ways easy to determine the precise character of possession in the wife which will be considered sufficient to sustain the husband's claim. As to wild land, the rule seems to be that a seisin in law, if they are not adversely held, is always considered sufficient, and this on the ground that such a seisin will enable her to maintain an action of trespass.[12] Of cultivated lands, a beneficial possession in the wife by her tenant or trustee,[13] or even a present right of possession by descent cast, is sufficient.[14] And even where by the terms of the will by which real estate was devised to a married woman, her right of possession was postponed until, by the accumulation of the rents and profits in the hands of a third person a certain debt of the testator should be paid, the court held that the interest held by this third person was merely a chattel interest, and not of higher dignity than a term for years, and that, as the "possession of the termor is the seisin of him who hath the inheritance," there was such a seisin in the wife as would support the husband's claim of curtesy.[15] So, held, too, where the land of the wife, one of the distributees under a will was, during the life of the wife, in the hands of the executors under the will, undistributed.[16]

A logical consequence of the maxim *seisina facit stipitem*, and its application to the wife's estate as a test of the husband's right as tenant by the curtesy, is the rule of the common law that "if there be an outstanding estate for life, the husband can not be tenant by the curtesy of the wife's estate in reversion or remainder, unless the particular estate be ended during coverture."[17] And this, of necessity, from the nature of things. Inasmuch as there can be but one seisin in the same land, and that inheres in a tenant of a freehold estate in possession, it follows that if the outstanding estate be an estate for life, there can be no seisin in the wife claiming in reversion or remainder, and, consequently, no curtesy. But if the particular estate determines during the coverture, the wife immediately becomes seised of the fee, and the second requisite for the existence of the estate is perfected. Although the common law rule of the necessity of seisin in the wife has been repudiated in this country, this consequence of it still remains, and the whole current of authority is to the effect that the husband of a tenant in reversion or remainder, can not become a tenant by the curtesy without the determination of the particular estate during coverture.[18]

In at least one American case, however, the abrogation of the maxim *seisina facit stipitem*, is followed out to its logical consequences, and it is held that where the wife was heir to certain lands which had been assigned to her mother in dower, the husband was entitled to his curtesy notwithstanding the dower estate did not terminate until after the death of his wife.[19]

As to the difficult and intricate questions arising upon the right of the husband to curtesy where the interest of the wife is a determinable fee, it is not the purpose to deal with them here; their solution belongs more properly to a discussion of estates and their incidents. It is sufficient to say that the general rule is that where the fee has once become vested in the wife, the husband's right at-

[12] McCorry v. King, 3 Humph. 267; Reaume v. Chambers, 22 Mo. 54; McKee v. Cottle, 6 Mo. App. 416; McDaniel v. Grace, 15 Ark. 465; Davis v. Mason, 1 Pet. 503; Jackson v. Sellick, 8 Johns. 262; Barr v. Galloway, 1 McLean, 476; Wells v. Thompson, 13 Ala. 804. In some of the States, where statutes have been passed upon the subject, the tendency of the legislative enactments is parallel to the decision, and is in the direction of giving the husband curtesy in all the "real estate *owned and* possessed by the wife" (2 Rev. St. Ky. ch. 47, art. 4, sec. 1), whether the actual possession is in her or in a trustee for her benefit. Phillips v. Ditto, 2 Duv. 549.

[13] Buchanan v. Duncan, 40 Pa. St. 82; Pewell v. Gossom, 18 B. Mon. 192; Carter v. Williams, 8 Ired. Eq. 177.

[14] Buchanan v. Duncan, 40 Pa. St. 82; Childers v. Bumgarner, 8 N. C. 297; Redus v. Hayden, 43 Miss. 614.

[15] Robertson v. Stevens, 1 Ired. Eq. 247. See also Young v. Langbein, 14 N. Y. Supreme Ct. 151.

[16] Dunscomb v. Dunscomb, Johns. Ch. 508 (7 Am. Dec. 504)

[17] 4 Kent. Com. 28.

[18] Planters' Bank v. Davis, 31 Ala. 633; Mackey v. Proctor, 12 B. Mon. 433; Shores v. Carley, 8 Allen, 425; Prater v. Hoover, 1 Cold. 544; Orford v. Benton, 36 N. H. 395; Tayloe v. Gould, 10 Barb. 400; Reed v. Read, 3 Head, 491; Stewart v. Barclay, 2 Bush. 550; Chew v. Southwark, 5 Rawle, 160; Watkins v. Thornton, 11 Ohio, 367; Hitner v. Ege, 23 Pa. St. 305; Stoddard v. Gibbs, 1 Sumn. 263; Ferguson v. Tweedy, 56 Barb. 168; Redusv. Hayden, 43 Miss. 614. As seisin could only be predicated of an estate of the dignity of a freehold, it followed that if the particular estate was only an estate for years, the seisin was in the reversioner, and a tenancy by the curtesy could arise before the termination of the particular estate. Malone v. McLaurin, 40 Miss. 161; Day v. Cochran, 24 Miss. 261; Rabb v. Griffin, 26 Miss. 579.

[19] McKee v. Cottle, 6 Mo. App. 416.

taches although the estate is liable to be divested by the happening of some subsequent event.[20]

The interest of the wife to support the husband's claim for curtesy must be a beneficial interest[21] in an estate of inheritance. Peaceable possession under claim of title is *prima facie* evidence of such estate.[22] And where property is settled to the sole and separate use of a married woman during her life, with power of appointment by will, and in default of appointment to go to her heirs in fee simple, it was held that she was invested with an equitable estate in fee under the rule in Shelley's case, and that her husband was entitled to curtesy.[23]

Tenancy by curtesy is one of the incidents of a legal estate of inheritance, and inasmuch as the incidents of an estate depend not upon the intentions of the grantor, but are engrafted upon it by the law, it is beyond the power of a testator in bestowing the *legal title* to property upon a female devisee to deprive her husband of his curtesy by express restrictions.[24] It seems, however, that this may be done in the case of the settlement of an equitable interest by special provisions in the instrument; for the rule is that a husband is entitled to curtesy in the equitable estate of his wife, unless expressly excluded therefrom by the instrument of settlement.[25] The intention to exclude him must be clearly and unequivocally expressed. A conveyance as a separate estate to the wife, expressed to be "free from the control of any future husband," or words of equivalent force, will not accomplish it.[26] The intervention of the equities of third persons, however, will make a difference, and where, in the exercise of the control of her separate estate under the Married Woman's Acts and the principles of equity, she conveys or leases to a third person, the rights of such third person will be protected.[27] While the husband's right to curtesy in the wife's equitable estate is unquestionable, it is important not to lose sight of the distinction between an equitable estate and a mere equitable right. Where two of the heirs of a common ancestor took a conveyance, in their own names, of land which the grantor had bound himself to convey to the deceased ancestor who had died intestate, and such heirs were declared trustees for the others; it was held that the right of one or the other heirs who was a married woman, to have her brothers converted into trustees for her, was a mere equitable right, and not such an estate as would entitle her husband to curtesy.[28]

The third requisite of an estate by curtesy is issue. The issue must be born alive and becapable of inheriting. For, as Coke says, by way of illustration: "If lands be given to a woman and to the heires males of

[20] Taliaferro v. Burwell, 4 Call. 321; Buchannan v. Shiffer, 2 Yeates, 374; Hay v. Mayer, 8 Watts, 203; Hatfield v. Sneden, 54 N. Y. 280; Crumley v. Deake, 8 Baxter (Tenn.), 361. See 2 Bac. Ab. 223; Co. Litt. 241 a.

[21] Chew v. Southwark, 5 Rawle, 160; Welch v. Chandler, 13 B. Mon. 429.

[22] Smoot v. Lecatt, 1 Stew. 590.

[23] Tillinghast v. Coggeshall, 7 R. I. 383. See, also, Cushing v. Blake, 29 N. J. Eq. 399.

[24] Mullany v. Mullaney, 3 Green ch. 16 (31 Am. Dec. 238), citing and discussing Corbet's Case, 1 Co. 85; Long v. Laming, 2 Burr. 1108; Watts v. Ball, 1 P. Wms. 109; Banks v. Sutton, 2 P. Wms. 383; Mildmay's Case, 6 Co. 41; Goodell v. Brigham, 1 Bos. & P. 192; Bennet v. Davis, 2 P. Wms. 316; Darley v. Darley, 3 Atk. 399; Leonard v. Sussex, 2 Vern. 526; Harvey v. Harvey, 1 P. Wms. 126; Atkinson v. Hutchinson, 3 P. Wms. 259; Roberts v. Dixwell, 1 Atk. 607; Hearle v. Greenbank, 3 Atk. 695; Glenorchy v. Bosville, Talb. Eq. 19; Austen v. Taylor, Amb. 376; Morgan v. Morgan, 5 Madd. 408.

[25] Tremmel v. Kleiboldt, 6 Mo. App. 552. See, also, Rawlings v. Adams, 7 Md. 26; Alexander v. Warrance, 17 Mo. 228; Robinson v. Codman, 1 Sumn. 128; Adair v. Lott, 3 Hill, 182; Dunscomb v. Dunscomb, 1 Johns. Ch. 508; Baker v. Heiskell, 1 Cold. 641; Tillinghast v. Coggeshall, 7 R. I. 383; Davis v. Mason, 1 Pet. 503; Lowry v. Steele, 4 Ohio, 170; Comer v. Chamberlain, 6 Allen, 166; Ege v. Meddar, 82 Pa. St. 86; Frazer v. Hightower, 12 Heisk. 94; Cushing v. Blake, 29 N. J. Eq. 399; s. c., 30 N. J. Eq. 689; Gilmore v. Gilmore, 7 Oreg. 374.

[26] Dubbs v. Dubbs, 31 Pa. St. 149; Payne v. Payne, 11 B. Mon. 138; De Hart v. Dean, 2 McArthur, 60; Rochon v. Lecatt, 2 Stew. 429; Smoot v. Lecatt, 1 Stew. 590; Carter v. Dale, 3 Lea. 710; Comer v. Chamberlain, 6 Allen, 166; Cushing v. Blake, 30 N. J. Eq. 689; Tremmel v. Kleiboldt, 6 Mo. App. 549. *Contra*, Sayers v. Wall, 26 Gratt. 394.

[27] Pool v. Blakie, 53 Ill. 495. But in Massachusetts, under a statute which provides that where land is conveyed to a married woman to her sole and separate use, she shall have the same rights and powers with respect to such land as if she were unmarried; and further, in another section, that the husband "shall be entitled to his estate by the curtesy in all lands and tenements held by his wife, as if this act had not been passed" (Mass. St. 1845, c. 208, secs. 5 and 7), it was held that, although the wife had conveyed her land under the authority granted by this act, the subsequent birth of issue alive, would entitle her husband after her death to an estate by the curtesy therein. Comer v. Chamberlain, 6 Allen, 166.

[28] Sentill v. Robeson, 2 Jones' Eq. 510. See, also, Nelson v. Hughes, 2 Jones' Eq. 33; Thompson v. Thompson, 1 Jones, 430.

her body, she taketh a husband and hath issue a daughter and dieth, he shall not be tenant by the curtesie; because the daughter by no possibility could inherit the mother's estate in the land; and, therefore, where Littleton saith, issue by his wife, male or female, it is to be understood, which by possibility may inherit, as heir to her mother of such estate."[29] Where issue was born a bastard, and was afterwards legitimated under the statute by the intermarriage of its parents and thus became capable of inheriting, it was held to be sufficient.[30]

Having now discussed the requisites for the existence of an estate by curtesy, we will now turn our attention to the nature of that estate, the limits of the tenant's rights and the methods of its termination.

The interest of a tenant by the curtesy is a vested legal estate, distinct from that of the wife, and is liable to all the incidents of any other freehold or life estate, and so continues until it is again merged into the fee. "If he were to convey or lease it, the title of the grantee or lessee could not be defeated by the husband and wife joining in a subsequent conveyance. They would thereby pass the wife's remainder, but could not affect the present estate created by the husband's previous conveyance. Until the death of the husband his grantee would be entitled to hold the premises. Nor need the wife join with the husband in a conveyance to pass his life estate, nor in a suit to recover the possession for the husband, or for damages sustained by trespass."[31] As it is expressed in another case, the interest of the husband after issue born, is a freehold during the joint lives of himself and wife, with a freehold in remain der for himself for life, as tenant by the curtesy, and a remainder to the wife and her heirs in fee.[32] Such being the nature of an estate by the curtesy, it follows that the usual incidents of legal estates are with propriety attributed to it. Consequently it has been held that it is subject to sale under execution against the husband, and that, too, in its inchoate condition after the birth of issue capable of inheriting but before the death of the wife;[33] that the husband may convey his interest as tenant by the curtesy by deed or mortgage without the concurrence of his wife;[34] that his rights with reference to the estate are only those of a life tenant; he can not complain of an injury to the inheritance committed by the tenant of an undetermined particular estate;[35] that the grantee of the husband has all the rights of a tenant for life, and that in respect to erections placed upon the premises by him for the purposes of trade, the question is substantially between a tenant for life and the remainderman;[36] that the existence of the title in the husband may be pleaded by a stranger in possession in bar to an action of ejectment by the heir, because the right of entry is in the husband and not in the heir;[37] that in consequence of the fact that the right of entry is in the husband and not in the heir, the statute of limitations will not run against the heir in favor of the disseisor during the continuance of the husband's estate;[38] but that the statue will run against the husband from the time when his right of entry becomes complete;[39] that the wife is not a necessary party to a conveyance by, or action by or against the husband involving his estate by the curtesy.[40]

The principle of equitable conversion has been applied to the husband's right as tenant by the curtesy, so as to entitle him to the in-

[29] Co. Lit. 29b. See, also, 2 Bl. Com. 128; 4 Kent's Com. 28; Ryan v. Freeman, 36 Miss. 175.

[30] Hunter v. Whitworth, 9 Ala. 965.

[31] Shortall v. Hinckley, 31 Ill. 227. See, also, Foster v. Marshall, 22 N. H. 491.

[32] Canby v. Porter, 12 Ohio, 80. See, also, Flagg v. Bean, 25 N. H. 49.

[33] Canby v. Porter, *supra*; Shortall v. Hinckley, *supra*; Roberts v. Whiting, 16 Mass. 186; Gillis v. Brown, 5 Cow. 388; Mattock v. Stearns, 9 Vt. 326; Mechanic's Bank v. Williams, 17 Pick. 438; Gardner v. Hooper, 3 Gray, 398; Van duzer v. Van Duzer, 6 Paige, 366; Taylor v. Smith, 54 Miss. 50. The law in this respect, however, has been altered in Massachusetts, as far as lands held by the wife to her sole and separate use are concerned. Mass. Gen. Sts., c. 108, sec. 1; Silsby v. Bullock, 10 Allen, 94; Staples v. Brown, 13 Mass. 64.

[34] Reaume v. Chambers, 22 Mo. 36. See, also, Meramen v. Caldwell, 8 B. Mon. 32.

[35] Matthews v. Bennett, 20 N. H. 21.

[36] Buckley v. Buckley, 11 Barb. 43; Washington v. Huger, 1 Desau. 360.

[37] Adair v. Lott, 3 Hill, 182.

[38] Heath v. White, 5 Conn. 235, Foster v. Marshall, 22 N. H. 491; Jackson v. Sellick, 8 Johns. 262; Meramen v. Caldwell, 8 B. Mon. 32; Witham v. Perkins, 2 Me. 400; Jaques v. Ennis, 25 N. J. Eq. 402; Miller v. Bledsoe, 61 Mo. 96.

[39] Shortall v. Hinckley, 31 Ill. 226. Of course, in such a case, after the death of the husband the fee is recoverable by the wife or her heirs.

[40] Shortall v. Hinckley, 31 Ill. 219; Mattocks v. Stearns, 9 Vt. 326.

come of the proceeds of a sale upon partition of premises in which he had an interest as tenant by the curtesy.[41]

The subject of waste forms in itself a separate and distinct department of the law, and it is not our purpose to discuss it here. It is sufficient to note a few decisions bearing directly upon the question, what is waste as committed by a tenant by the curtesy? Such a tenant has the right of any tenant of a life estate to reasonable estovers, which is confined strictly to wood and timber sufficient for the supply of the estate, and it must be actually used and consumed upon the estate or for purposes connected with its proper use, occupancy and enjoyment. For a tenant by the curtesy of eighty acres, adjoining another tract which he owned in fee, to take timber from the eighty acres to make improvements upon his own land is waste.[42]

Of the methods in which the estate by curtesy may be defeated and determined, the most prominent is divorce *a vinculo*. Said Judge Redfield, in Mattocks v. Stearns:[43] "It is undoubtedly true that this estate might be determined by a divorce *a vinculo*, before the death of either husband or wife. But this contingency is so remote as not to enter into the ordinary calculations of the duration of the relation of married life."[44] But such an effect will not be produced by a divorce *a mensa et thoro*.[45] In Tennessee, however, the court has confessedly departed from the rule of the common law, and held in favor of an innocent grantee of a tenant by the curtesy initiate, that a divorce *a vinculo*, for cause arising subsequent to the vesting of the title by curtesy, and in no degree affecting the validity of the original marriage contract, will not be held to defeat the interest of such innocent grantee.[46] Adultery on the part of the husband will not work a forfeiture of his curtesy.[47] But he may, like any other life-tenant, forfeit his estate by a wrongful alienation, tending to the disherison of the reversioner or remainderman.[48] Nor when the estate has once vested will the execution of a *disclaimer* by the tenant by curtesy have the effect to divest it. That can be accomplished only by a conveyance.[49]

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41 Ellsworth v. Cook, 8 Paige, 643.
42 Armstrong v. Wilson, 60 Ill. 226.
43 9 Vt. 335.
44 See to the same effect, Wheeler v. Hotchkiss, 10 Conn. 225; Co. Litt. 30; 2 Bla. Com. 127; 1 Rop. on Husb. and Wife, 15, 45, 48: 1 Swift Dig., 84.
45 Rochon v. Lecatt, 2 Stew. 429; Smoot v. Lecatt, 1 Stew. 590.
46 Gillespie v. Worford, 2 Cold. 632.
47 Wells v. Thompson, 13 Ala. 808.
48 4 Kent's Com. 34; French v. Rollins, 21 Me. 372; Wells v. Thompson, *supra*. *Contra*—McKee v. Pfout, 3 Dall. 486. But a sale of his interest as tenant by the curtesy will not have such effect. Wells v. Thompson, *supra*.
49 Watson v. Watson, 13 Com. 83.

REPETITION OF TELEGRAPHIC MESSAGES.

There has been much discussion among text writers upon this subject, and the highest courts in the various States, and to the present time it is unsettled by a general rule pervading all the United States, whether a condition printed upon the blanks of a telegraph company, which are used for the message, providing that the company would be liable for a repeated message only, is valid or not. The condition usually provides that it shall be repeated at half rates. Formerly, when the art of telegraphy was in its first stages, and the instruments used were imperfect, it would seem almost absolutely necessary that the message should be sent back to the office from which it was received, and be repeated. And, even at this late day, when the art is almost as perfect as it can possibly be made, and when such an enormous share of business is daily accomplished by means of the electric telegraph, many courts have sustained the condition that no lialility would be incurred by the company unless the message has been repeated.[1]

The court, in Ellis v. Tel. Co.,[2] bases its reasons for the decision upon the ground that

1 Wann v. Tel. Co., 37 Mo. 472; Camp v. Tel. Co., 1 Metc. (Ky.) 165; Western Union Tel. Co. v. Carew, 15 Mich. 525; Passmore v. Tel. Co., 78 Pa. 238; New York Tel. Co. v. Dryburgh, 35 Pa. 298; Breese v. Tel. Co., 48 N. Y. 132; Ellis v. Tel, Co., 13 Allen, 226; McAndrew v. Tel. Co., 33 Eng. L. & Eq. 180; Birney v. Tel. Co., 18 Md. 341; De Rutte v. Tel. Co., 1 Daly, 547; Lewis v. Great Western R. Co., 5 H. & N. 867; Schwartz v. Atlantic & Pacific Tel. Co., 18 Hun (N. Y.), 157; Redpath v. Western Union Tel. Co., 112 Mass. 71; Young v. Tel. Co., 65 N. Y. 163.
2 13 Allen, 226.

a telegraph company is a common carrier, saying: "But he (meaning a common carrier) may, to a certain extent, in the mode above indicated, limit the extent of his liability, or graduate the amount of his compensation, according to the risk which he assumes, as well as by the nature of the service which he renders. It is upon this ground that it is held, that a common carrier, although by the rules of law he is an insurer of the property intrusted to him, may regulate the extent of his liability by a notice, brought home to his employer and assented to by him, either directly or by implication.[3]" But the authorities are not altogether harmonious upon this point of a telegraph company being in the nature of a common carrier.[4] Again, on the other hand, it has been maintained by arguments and *dicta* of great learning that, under the present state of the telegraph system, it is as easy to telegraph from a copy as it is to write from a copy; that as great accuracy is now obtained as it is possible to acquire, and that a regulation of this nature set up by the company, between it and the sender, is of no effect, the courts holding that the telegraph company is in the nature of a public officer, and owes a duty to the public; that no public officer would contemplate setting up any agreement whereby his liability, while acting in an official capacity, would be curtailed. Hence several courts have held the restrictions which telegraph companies have endeavored to impose upon their liability, invalid, because they are unreasonable and against public policy.[5]

It would be a hard measure to impose upon the sender of a telegraphic message, an agreement of which he had no knowledge and was obliged to sign rapidly. A condition which professes to relieve the company from negligence, while it is often held valid, may tend to throw the burden of proof of such negligence upon the plaintiff.[6]

Another question may arise, whether the company would be liable to the receiver of the telegram instead of the sender. It is clear if the receiver have notice of the condition imposed, and take it subject to such qualification, he would be bound. If the company negligently make a statement to him in consequence of which he suffers an injury, he is not affected by any agreement between the sender and the company.[7] The case of N. Y. Telegraph Co. v. Dryburgh,[8] was an action brought by the receiver of the message to recover the amount of damage which the company had occasioned by an alteration of the message. The message was sent to a Philadelphia florist for "Two hand. boquets," and the operator supposing hand was an abbreviation of hundred, altered it and thus it was delivered to the plaintiff, who sued the company and obtained a verdict which was sustained on appeal. The court held that it was the duty of the company to transmit the very message prescribed. The English rule upon this point is, that no action will lie against a telegraph company at the suit of the receiver for the misdelivery of a telegram, unless there is either a contract between him and the company, or fraud on their part in the transmission of it.[9]

In W. U. Tel. Co. v. Buchanan,[10] it was held one employing a telegraph is bound by the regulations of the company which are known to him, although he does not write his message upon the printed blanks containing them.[11]

There may often be a question as to where the burden of proof rests, whether on the plaintiff or on the defendant; but as a rule the circumstances must in a great measure regulate this matter. If suit is brought by the receiver, alleging that the company negligently brought him a false message, the burden is on the plaintiff to prove such negligence, although it will be sufficient to shift it

[3] Judson v. Western R. Co., 6 Allen, 486, 490.

[4] See Alta C. Tel. Co., 13 Cal. 422; Mumford v. Tel. Co., 45 Barb. 275.

[5] United States Tel. Co. v. Gildersleeve, 29 Md. 232; Tyler v. Tel. Co., 60 Ill. 421; Western Union Tel. Co. v. Meek, 49 Ind. 53; Manville v. Tel. Co., 37 Iowa, 214; Western Union Tel. Co. v. Tyler, 74 Ill. 168; 27 Iowa, 433; 60 Me. 9; Candee v. Western Union Tel. Co., 34 Wis. 471; Bartlett v. Western Union Tel. Co., 62 Mo. 209. See, also, 16 West. Jurist, 147, for a late Ohio case, and Western Union Tel. Co. v. Blanchard (Ga.), 14 Cent. L. J. 331.

[6] Ellis v. Tel. Co., 13 Allen, 226; Birney v. Tel. Co., 18 Md. 341; Sweatland v. Tel. Co., 27 Iowa, 432; Breese v. Tel. Co., 48 N. Y. 132.

[7] La Grange v. Tel. Co., 25 La. An. 383; Western Union Tel. Co. v. Fenton, 52 Ind. 1; New York Tel. Co. v. Dryburgh, 35 Pa. 298.

[8] *Supra.*

[9] Dickson v. Reuter's Tel. Co., 2 L. R. C. P. Div. 62; 46 L. J. C. P. Div. 197; 35 L. T. N. S. 842; 37 L. T. N. S. 370.

[10] 35 Ind. 429.

[11] See, also, Passmore v. Tel. Co., 78 Pa. 238.

if it is proven the message received was not that sent.[12] But where an action is brought to recover damages for a breach of contract to send a telegram, and the defense is negligence of the plaintiff, the *onus* is on the defendant to prove it.[13]

When it is stated to the company that a pecuniary damage may result from any neglect on its part, it does not relieve it from liability.[14] This question of whether a regulation of the company requiring the message to be repeated is reasonable or not, is one which in all probability will never be settled by a national rule, for it is a question which strikes courts very differently. It is safe to say that in the future, as it has been in the past, courts will differ in their reasoning, and as many decisions will be rendered upon one side as upon the other. Where the question has been ruled on by the court of last resort in a State, the question is undoubtedly settled, but where it has not, there is a wide field for argument. ADDISON G. MCKEAN.

[12] Kittenhouse v. Independent Tel. Co., 44 N. Y. 263; Western Union Tel. Co. v. Carew, 15 Mich. 533; Birney v. Tel. Co., 18 Md. 341; 1 Daly, 474.

[13] Baldwin v. United States Tel. Co., 1 Lans. 125; 45 N. Y. 744.

[14] Western Union Tel. Co. v. Wanger, 55 Pa. 262; Rittenhouse v. Tel. Co., 44 N. Y. 265; Manville v. Western Union Tel. Co., 37 Iowa, 220.

ATTORNEYS AT LAW — PROFESSIONAL SERVICES — COMPENSATION — SUIT — MEASURE OF RECOVERY.

HEAD v. HARGRAVE.

Supreme Court of the United States, October Term, 1881.

1. In an action for legal services, the opinions of attorneys as to their value are not to preclude the jury from exercising their "own knowledge and ideas" on the subject. It is their province to weigh the opinions by reference to the nature of the services rendered, the time occupied in their performance, and other attending circumstances, and by applying to them their own experience and knowledge of the character of such services. The judgment of witnesses is not, as a matter of law, to be accepted by the jury in place of their own.

2. A "statement" of the case, according to the law regulating civil proceedings in the Territory of Arizona, takes the place of a bill of exceptions, when the alleged errors of law are set forth with sufficient matter to show the relevancy of the points taken; and though prepared for and used on a motion for a new trial, it is available on appeal from the judgment, when, by stipulation of the parties, it is made a part of the record for that purpose.

In error to the Supreme Court of the Territory of Arizona.

This was an action brought in a district court of Arizona to recover the sum of $2,000, alleged to be owing by the defendants to the plaintiffs for professional services as attorneys and counsellors at law in that territory in 1877 and 1878. The complaint alleges that the services were performed in several suits and proceeding upon a retainer by the defendants; and that they were reasonably worth that sum. The answer is a general denial.

On the trial, one of the plaintiffs testified to the rendition of the services by them in several suits, stating generally the nature of each suit, the service performed and its value. Five attorneys at law also testified to the value of the services; three of whom were called by the plaintiffs and two by the defendants. They differed widely in their opinions, the highest estimate placing the value of the services at $5,440, the lowest at $1,000.

The court instructed the jury, that, in determining the value of the plaintiff's services, they might consider their nature, the length of time they necessarily occupied, and the benefit derived from them by the defendants; that the plaintiffs were entitled to reasonable compensation for the services rendered; and that the reasonableness of the compensation was a fact to be determined from the evidence as any other controverted fact in the case; and then proceeded as follows: "The services rendered were skilled and professional, and for the purpose of proving to you the value of that class of services rendered, professional gentlemen, attorneys at law, claiming to be familiar with the value of such services, have testified before you. If you accredit these witnesses with truthfulness, their testimony should have weight with you; and the fact as to what is a reasonable compensation should be determined from the evidence offered, and not from your own knowledge or ideas of the value of that class of services. In other words, you must determine the value of the services rendered from the evidence which has been offered before you, and not from your own knowledge or ideas of the value of such services."

The defendants, thereupon, asked the court to instruct the jury as follows: "In determining the value of the plaintiffs' services the jury are not bound by the testimony of the expert witnesses; that testimony may be considered by the jury; but if, in their judgment, the value fixed by those witnesses is not reasonable, they may disregard it, and find the amount which, in their judgment, would be reasonable. In determining the value of the plaintiffs' services the jury are not bound by the opinions of the witnesses, unless the jury shall find from all the evidence taken together, including the nature of the services, the time occupied in the performance of them, and the result of them, and the benefit derived by the

defendants from the rendition of said services, that said opinions are correct."

The court refused to give these instructions, and an exception was taken. The jury thereupon gave a verdict for the plaintiffs for $1,800; upon which judgment was entered. A statement of the proceedings at the trial was then prepared, which, among other things, set forth the alleged errors of law excepted to by the defendants. This statement was used on a motion for a new trial, which was denied; and by stipulation it was embodied in the papers for the appeal to the Supreme Court of the territory from the judgment, as well as from the order denying the new trial. The order and judgment were both affirmed; and, to review the judgment, the case is brought to this court.

Mr. Justice FIELD, after stating the case, delivered the opinion of the court:

The defendants in error object to the use of the statement, which sets forth the exceptions taken, as not constituting a part of the record before us. The ground of the objection is, that the statement was prepared for and used on the motion for a new trial, with the disposition of which this court can not interfere. The objection would be tenable but for the stipulation of the parties that the statement might be used on appeal from the judgment. A statement of the case, according to the law regulating civil proceedings in the territory, takes the place of a bill of exceptions, when the alleged errors of law are set forth with sufficient matter to show the relevancy of the points taken. It is not the less available on appeal from the judgment when, by stipulation, it is embodied in the record for that purpose, though used on the motion for a new trial. We have had occasion to refer to this subject in Kerr v. Clampitt, which arose in Utah, where a similar system of procedure in civil cases obtains; and it is unnecessary to repeat what is there said. 95 U. S., 188.

The only question presented for our consideration is whether the opinions of the attorneys, as to the value of the professional services rendered, were to control the judgment of the jury so as to preclude them from exercising their "own knowledge or ideas" upon the value of such services. That the court intended to instruct the jury to that effect is, we think, clear. After informing them that in determining the value of the services, they might consider their nature, the time they occupied, and the benefit derived from them; also that the plaintiffs were entitled to reasonable compensation for the services, and that the reasonableness of the compensation was a fact to be determined from the evidence, it proceeded to call special attention to the testimony of the attorneys, and told the jury that if they accredited these witnesses with truthfulness their testimony should have weight, and the fact as to what is reasonable compensation should be "determined from the evidence offered," and not from their own knowledge or ideas of the value of that class of services, and emphasized the instruction by repetition, as follows: "You must determine the value of the services rendered from the evidence that has been offered before you, and not from your own knowledge or ideas as to the value of such services." This language qualifies the meaning of the previous part of the instruction. It is apparent from the context that by the words "evidence offered" and "evidence that has been offered before you" reference was made to the expert testimony, and to that alone. Taken together, the charge amounts to this: That while the jury might consider the nature of the services and the time expended in their performance, their value—that is, what is reasonable compensation for them—was to be determined exclusively from the testimony of the professional witnesses. They were to be at liberty to compare and balance the conflicting estimates of the attorneys on that point, but not to exercise any judgment thereon by application of their own knowledge and experience to the proof made as to the character and extent of the services; that the opinions of the attorneys as to what was reasonable compensation was alone to be considered. That the defendants so understood the charge is evident from the qualifications of it which they desired to obtain; and the jury may, in like manner, have so understood it. And as we so construe it, we think the court erred, and that it should have been qualified by the instructions requested. Those instructions correctly presented the law of the case. It is true that no exception was taken to the charge; but its modification was immediately sought by the instructions requested, and to the refusal to give them an exception was taken. Objection to the charge was thus expressed as affirmatively and pointedly as if it had been directed in terms to the language used by the court.

It was the province of the jury to weigh the testimony of the attorneys as to the value of the services, by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying to it their own experience and knowledge of the character of such services. To direct them to find the value of the services from the testimony of the experts alone, was to say to them that the issue should be determined by the opinions of the attorneys and not by the exercise of their own judgment of the facts on which those opinions were given. The evidence of experts as to the value of professional services does not differ, in principle, from such evidence as to the value of labor in other departments of business, or as to the value of property. So far from laying aside their own general knowledge and ideas, the jury should have applied that knowledge and those ideas to the matters of fact in evidence in determining the weight to be given to the opinions expressed; and it was only in that way that they could arrive at a just conclusion. While they can not act in any case upon particular facts material to its disposition resting in their private knowledge, but should be governed by the evidence adduced, they may, and to

act intelligently they must, judge of the weight and force of that evidence by their own general knowledge of the subject of enquiry. If, for example, the question were as to the damages sustained by a plaintiff from a fracture of his leg by the carelessness of a defendant, the jury would ill perform their duty and probably come to a wrong conclusion, if, controlled by the testimony of the surgeons, not merely as to the injury inflicted, but as to the damages sustained, they should ignore their own knowledge and experience of the value of a sound limb. Other persons besides professional men have knowledge of the value of professional services; and, while great weight should always be given to the opinions of those familiar with the subject, they are not to be blindly received, but are to be intelligently examined by the jury in the light of their own general knowledge; they should control only as they are found to be reasonable.

As justly remarked by counsel, the present case is an excellent illustration of the error of confining the jury to a consideration merely of the opinions of experts. Of the five attorneys who were witnesses, no two agreed; and their estimates varied between the extremes of $1,000 and $5,440. Directing the jurors to determine the value of the professional services solely upon these varying opinions was to place them in a state of perplexing uncertainty. They should not have been instructed to accept the conclusions of the professional witnesses, in place of their own, however much that testimony may have been entitled to consideration. The judgment of witnesses, as a matter of law, is in no case to be substituted for that of the jurors. The instructions tended to mislead as to the weight to be given to the opinions of the attorneys, especially after qualifications of them designed to correct any misconception on this head were refused.

In Anthony v. Stinson, a question, similar to the one here presented, came before the Supreme Court of Kansas and a like decision was reached. The instruction given at the trial that the testimony of certain lawyers as to the value of professional services should be the guide of the jury, and that they should be governed by it in finding the value of the services rendered, was held to be erroneous; the court observing that the jury were not to be instructed as to what part of the testimony before them should control their verdict; that, in order to control it, the testimony of experts should be of such a character as to outweigh by its intrinsic force and probability all conflicting testimony; and that they could not be required to accept, as a matter of law, the conclusions of the witnesses instead of their own. 4 Kan. 212.

In Patterson v. Boston, which arose in Massachusetts, the question was as to the damages to be awarded to the plaintiff for his property, taken to widen a street in Boston. The trial court instructed the jury that, in estimating the amount of the damages, if any of them knew, of his own knowledge, any material fact which bore upon the issue, he ought to disclose it and be sworn, and communicate it to his fellows in open court in the presence of the parties; but that, in making up their verdict, they might rightfully be influenced by their general knowledge on such subjects, as well as by the testimony and opinions of witnesses. The case being taken to the Supreme Court of the State, it was held that the directions were not open to exception. Said Chief Justice Shaw, speaking for the court: "Juries would be very little fit for the high and responsible office to which they are called, especially to make an appraisement, which depends on knowledge and experience, if they might not avail themselves of those powers of their minds when they are most necessary to the performance of their duties." 20 Park. 166.

In Murdock v. Sumner, the same court, speaking through the same distinguished judge, said that "the jury very properly exercise their own judgment and apply their own knowledge and experience in regard to the general subject of inquiry." In that case a witness had testified as to the quality, condition and cost of certain goods, and given his opinion as to their worth, and the court said that "the jury were not bound by the opinion of the witness; they might have taken the facts testified by him as to the cost, quality and condition of the goods, and come to a different opinion as to their value." 22 Seel. 158.

In like manner, in this case, the jurors might have taken the facts testified to by the attorneys as to the character, extent and value of the professional services rendered, and then come to a different conclusion. The instructions given, whilst stating that the nature of the services rendered, the time occupied in their performance, and the benefit derived from them might be considered by the jury, directed them that they should be governed by the opinions of the experts as to the value of the services, and, in effect, forbade them to exercise their own knowledge and ideas on that kind of services. This error would have been avoided if the instructions requested by the defendants had been given.

It follows that the judgment of the court below must be reversed, and the cause remanded for a new trial; and it is so ordered.

FEDERAL COURTS — JURISDICTION — CITIZENSHIP OF PARTIES — COLLUSIVE CONVEYANCE TO GIVE JURISDICTION.

COFFIN v. HAGGIN.

United States Circuit Court, District of California, March 13, 1882.

Where real estate is conveyed to a non-resident of the State, for the purpose of giving the Federal courts jurisdiction of a suit subsequently brought in his name (his permission being obtained), but for the

benefit of the grantor, who expects a reconveyance though no promise to reconvey has been ma e by the grantee, the conveyance being without his knowledge and without consideration, *held*, that the transaction was merely collusive to give jurisdiction, and the cause should be dismissed.

Stetson & Houghton, for complainant; *McAllister & Bergin*, of counsel; *Louis T. Haggin* and *John Garber*, for defendants.

SAWYER, Circuit Judge, delivered the opinion of the court:

On April 15, 1880, one Bonestell, conveyed to the complainant, Coffin, a citizen and resident of New York City and State, nineteen hundred and twenty acres of land, worth, according to his estimate, about twenty thousand dollars—the expressed consideration being ten dollars; but no consideration was in fact paid. The deed was not recorded. On the same day Mr. Stebbins also conveyed twelve hundred and eighty acres in the same vicinity to the same party, costing and worth about ten dollars per acre, including some six dollars per acre expended for procuring water for irrigating—the expressed consideration in this deed being ten dollars; but nothing being in fact paid. Neither Bonestell nor Stebbins knew Coffin, or ever saw him, or had any communication with him upon this or any other subject; and at the date of the conveyances, so far as Bonestell and Stebbins are aware, Coffin knew nothing either of the conveyances, or the intention to convey to him. On April 25, ten days afterwards, and before sufficient time had elapsed to exchange communications by mail, this bill was filed to enjoin the diversion of the waters of Kern River from its channel which ran through the lands conveyed. The bill alleges the ownership of the land by Coffin, and that Coffin is a citizen of New York, and the parties defendants citizens of California. The citizenship of the parties is the jurisdictional fact. The several defendants filed pleas to the jurisdiction, denying that Coffin is the *bona fide* owner of the land, but alleging that the land was conveyed to him by Bonestell and Stebbins, respectively, only colorably and collusively for the sole purpose of enabling them to bring the suit and litigate it for their own benefit in the name of Coffin in the United States courts; that they are still the real parties in interest and substantial owners of the land.

The testimony upon the issues raised by these pleas, and the replications is mainly that of Bonestell and Stebbins. Neither Coffin nor the attorney who managed the transaction was examined. Bonestell testifies—and the testimony of Stebbins is substantially the same—that he never saw or knew Coffin; that he made the conveyance by the advice of Reddington for the purpose of beginning this suit; Stebbins' testimony is by advice of counsel; that no consideration was paid; that there was no agreement to reconvey, but he did not know but that he might get it back; that he expected he was to get it back some time, but not a word was said about getting it back; that it was said to him that an absolute deed was necessary without agreement to reconvey to give jurisdiction; that he was advised it was necessary to make an absolute transfer and he made it; that the purpose was to bring this suit; that he hoped sometimes to get it back, but could not claim it; that he trusted entirely to Coffin's generosity, because it was considered one of those cases where it was necessary to make such a deed; that the attorney in the case, Mr. Stetson, told him that the deed was at the notary's, and he went there and executed it and left it there to be called for; that he understood Mr. Coffin was in New York; that he never got the deed again, and don't know what became of it; that he intended it for Mr. Coffin, because his name was in it, and there was no other person for it to go to. Mr. Stebbins testifies to a similar state of facts, and that, although there was no agreement to that effect, he hoped to get something—"I hope the suit on account of which I gave this title will result in establishing the title to the land. I gave the deed for that purpose, and if that purpose is accomplished, I hope to get something for what I have deeded away." He stated that in making the conveyance without any previous consultation with Coffin, a stranger t him, he relied on the honor usually found amon men in their transactions with their fellows.

Mr. Redington who verifies the bill, as the a torney in fact of Coffin, says he knows Coffin has heard about these deeds, but does not remember having ever seen them; has never ha any conversation with Coffin upon the subject o the land; did not suggest to the grantors the making of the deeds; had nothing to do with making the deeds; had no conversatson about the deeds, but received a telegram from Coffin requesting him to sign, as his attorney in fact, the papers in Stetson & Houghton's hands, referring as he supposed to the bill in equity in this case, which he accordingly did sign; that he has held a power of attorney from Coffin for several years. From other testimony it seems that Coffin is a partner of Mr. Redington in a New York firm, of which Redington is a member. Mr. Stetson, solicitor of complainant, produced the deeds on request of defendants' solicitors. A clerk in the office of Mr. Stetson testified, that by direction of Mr. Stetson he mailed the deeds to Mr. Coffin at New York on April 15, in a registered letter, and in due course of mail, about the second or third of May, got a post-office receipt therefor. It does not appear what communication, if any, was made with the deeds; or what response, if any, to the communication was received from Mr. Coffin.

Whether the counsel under whose advice these highly important transactions were had, made any arrangement with Coffin on behalf of the parties in interest not communicated to them, and if so, what arrangement, or what communication was had between them upon the subject of the conveyances and suit, does not appear. Whatever occurred—and in view of the great import-

ance of the steps taken, it is natural to suppose that something must have transpired—it is but fair to presume that what did take place between them would not strengthen the complainant's position, for it was important for him to make as strong a case on the pleas as possible. Had these facts been favorable to his view, as they were wholly under complainant's control, it is scarcely probable that he would have omitted to put them in evidence. The defendants themselves have been compelled to go into the camp of their opponents for all their evidence to sustain their pleas. It is not to be presumed, therefore, that the evidence to support the pleas has even a gloss in defendant's favor that the facts will not fully justify.

Thus to state the facts in the strongest light in favor of the complainant, or complainants, as the case may be, whether nominal or real, I think it clearly appears from the evidence that the grantors, Bonestell and Stebbins, were desirous of bringing a suit in the United States courts to determine their rights to the waters of Kern River, and the United States Courts not having jurisdiction over either the subject matter or the parties, they set about devising some plan by which a case of jurisdiction could be made; that their counsel, Messrs. Stetson & Houghton, advised them that the object could be accomplished by making an absolute conveyance to a citizen of some other State; then bring and prosecute the suit in his name, but that in order not to defeat the jurisdiction, it would be necessary to avoid making any agreement for a reconveyance; that it would be necessary to rely upon the honor of the grantee to reconvey the land; that Mr. Coffin's name was suggested by some one, it does not clearly appear by whom, and accepted; that the deeds were prepared by the counsel, sent to a notary for execution and the parties notified to go and execute them, which they did, and left the deeds to be handed to Mr. Stetson; and that they subsequently came to his possession; that he caused them to be sent to Mr. Coffin, and, immediately upon their receipt, this being the first intimation, so far as appears, to Coffin of the making of these deeds, he, Coffin, telegraphed to Redington to sign, as his attorney in fact, the bill in equity prepared by Stetson, which he accordingly did, and the bill in this case was thereupon filed ten days after the date of the execution of the deeds; that Bonestell thus deeded voluntarily, without consideration, to an entire stranger whom he had never seen or known, and who had no interest whatever in the matter, property of the value of $20,000, for the very purpose of making a case of jurisdiction in this court, taking special care not to communicate with him on the subject, and especial care that no one should make any assurance or intimation of any reconveyance; and Stebbins in like manner, and with like precautions, for the same express purpose, conveyed property of the value of more than $12,000; that the sole purposes of the said grantors in making the conveyance was to prosecute their contemplated suit in the name of Coffin in the United States courts, but for their own benefit, relying upon Coffin's honor to reconvey at the termination of the litigation, or before, and expecting he would so reconvey; that Coffin, upon being informed of the execution of the deeds, co-operated in this plan by immediately authorizing by telegraph the proposed suit to be commenced in his name. What further he may do, of course remains for the future to disclose. He has got standing in his name, however, a large amount of property which was conveyed to him by entire strangers, without consideration, and even without his knowledge, for the sole purpose of giving to the United States courts jurisdiction of a suit to be prosecuted in his name for their own benefit, and relying upon his honor as a man to reconvey to them on or before the accomplishment of their object. Immediately upon receiving the information as to what has taken place, he assents to the bringing of the suit, the papers in which were, doubtless, and must almost necessarily have been, already prepared, and then accepts the situation, and cooperates with his grantors in carrying out their purposes. He does not even await the slow process of communication by mail, but uses the telegraph to express his assent. He does not act of his own motion, but moves upon the suggestion of others to carry out their own purposes. He can not repudiate the right or claim of his grantors to a reconveyance upon the accomplishment of their purpose, notwithstanding the fact that care was designedly and studiously taken not to commit him by express promise without an act of perfidy. To refuse a reconveyance under the circumstances would be a breach of confidence, a breach of faith and trust between man and man of which no honest or honorable man would be guilty.

There can be no possible doubt that this is in fact, whatever it may be in form and appearance, the suit of Bonestell and Stebbins, for their own use and benefit, and that the conveyance and prosecution of the suit in another's name are only colorable and collusive. It is no less so because the agreement and co-operation are tacit and not express. The fact that the conveyances were made by the grantors for their own purposes of bringing and prosecuting the suit without even the knowledge of the grantee, and that the grantee immediately, without delay or hesitation, carried out that special purpose upon receiving information of their act and design, shows an assent to their act, a co-operation in their purpose, and further shows that parties have been "collusively made, for the purpose of creating a case cognizable * * * * in the said circuit court;" and "that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court," within the meaning of the provisions of section 5 of the act of 1875. The case of De Laveaga v. Williams, 5 Saw. 574, is relied on by the

complainant to sustain the jurisdiction in this case, and it is, I think, very apparent, that the whole arrangement in this case was made and all the steps taken with especial reference to the rulings in that case—with a pre-conceived purpose to bring it within that decision. It is true, that the suit was brought since the passage of the act of 1875; but it was considered and decided with reference to the decisions of the Supreme Court made upon prior acts of Congress. I took part in the decision, and, although I thought the question not free from doubt, yet upon the whole, I came to the conclusion that it was in accordance with the rulings of the Supreme Court as they then stood under the prior statutes. It was not suggested by counsel on the hearing, however, that the provisions of section 5 of the act of 1875, in any degree affected the question, nor did it occur to my mind, nor was the effect of that act considered by the court in deciding the case.

The decision of the Supreme Court at the present term in Williams v. Town of Nottawa, shows that that act has an important bearing upon this question, which must now be considered. In that case the court, by the Chief Justice, says: "But whatever may have been the practice in this particular, under the act of 1789, there can be no doubt what it should be under the act of 1875. In extending a long way the jurisdiction of the courts of the United States, Congress was specially careful to guard against the consequences of collusive transfers to make parties, and made it the duty of the court, on its motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of the kind appeared. This was for the protection of the court, as well as the parties against fraud upon its jurisdiction; for, as was very properly said by Mr. Justice Miller, speaking for the court, in Barney v. Baltimore, *supra*, 'such transfers for such purposes are frauds upon the court, and nothing more.' * * * * Inasmuch, therefore, as it was the duty of the circuit court, on its own motion, as soon as the evidence was in, and the collusive character of the case shown, to have stopped all further proceedings and dismiss the suit, the judgment is reversed, and the cause remanded with instructions to dismiss the suit at the cost of the plaintiff in error, because it did not really and substantially involve a dispute or controversy within the jurisdiction of the court. * * * * In this connection we deem it proper to say that this provision of the act of 1875 is a salutary one, and that it is the duty of the circuit courts to exercise their power under it in proper cases." See, also, to same effect, Hawes v. Water Works, 14 Cent. L. J. 288. After a full consideration of the facts I am constrained to think that this is a case which the court under the act of 1875, is required to dismiss on the ground that it is colorably and collusively brought in the name and with the acquiescence of a party who has really no substantial interest in the matter.

I therefore find the plea to be true, and that defendants are entitled to have the bill dismissed for want of jurisdiction, and it is so ordered.

SERVICE OF PROCESS ON NON-RESIDENT —PUBLICATION — PRACTICE — EXECUTION—SALE—CONFIRMATION.

JOHNSON v. LINDSAY.

Supreme Court of Kansas, April 6, 1882.

1. A sale of real estate made by a sheriff under an execution or order of sale, is not consummated so as to entitle the purchaser to a conveyance thereof, and to vest in him a title thereto until the court has judicially acted upon it.

2. Where a judgment has been rendered against a party without other service than by publication in a newspaper, and the land attached in the action is sold to satisfy the judgment, and the sale is pending for confirmation, but before confirmation, and in less than five months from the rendition of the judgment, the defendants apply to the court, under sec. 77 of the Code,* to open up the judgment and let them in to defend, and a *prima facie* showing made by the defendants for the vacation of the judgment under the terms of said section, the court commits error to refuse to consider and dispose of the application to vacate the judgment before hearing and disposing of a motion to confirm the sale of the property sold under such judgment.

3. Where a sale of real estate has been made under a judgment rendered without other service than by publication in a newspaper, and before the confirmation of such sale the judgment is opened up and the defendant is let in to defend under the terms of sec. 77 of the Code, all proceedings subsequent to the judgment, including the sale, are to be vacated and wholly set aside.

* Sec. 77, of the Kansas Code, which is construed in the above opinion, and which in a similar form is common to many of the Code States, is in these words: "A party against whom a judgment, or order, has been rendered, without other service than by publication in a newspaper, may, at any time within three years after the date of the judgment or order, have the same opened, and be let in to defend. Before the judgment or order shall be opened, the applicant shall give notice to the adverse party of his intention to make such an application, and shall file a full answer to the petition; pay all costs, if the court requires them to be paid, and make it appear to the satisfaction of the court by affidavit that, during the pendency of the action, he had no actual notice thereof in time to appear in court and make his defense; but the title to any property, the object of the judgment or order sought to be opened, which, by it, or in consequence of it, shall have passed to a purchaser in good faith, shall not be affected by any proceedings under this section, nor shall they affect the title of any property sold before judgment under an attachment. The adverse party, on the hearing of an application to open a judgment or order, as provided by this section, shall be allowed to present counter affidavits to show that, during the pendency of the action, the applicant had notice thereof to appear in court and make his defense." Dassler's Comp. Laws of Kansas, p. 611.

L. Stillwell for plaintiff in error; *Hutchings & Denison* for defendant in error.

HORTON, C. J., delivered the opinion of the court:

This is a proceeding to review an order of the court below confirming a sheriff's sale. The facts are substantially as follows:

On July 14, 1880, A. Lindsay, one of the defendants in error (plaintiff below), commenced an action against plaintiffs in error (defendants below) to recover $2,150, as damages sustained on account of certain alleged wrongful acts of the defendants. Service was made on the defendants below by a publication in a newspaper. An affidavit alleging that the defendants were non-residents of the State was filed, and an order of attachment obtained and levied on four hundred acres of land in Neosho County. At the November term, 1880, of the district court, judgment was rendered by default in favor of Lindsay against the Johnsons for $2,150 with seven per cent. interest from July 14, 1880, and costs, and the property attached was ordered to be sold. The order of sale issued December 27, 1880; the land was sold February 12, 1881, the defendant in error, Henry Lodge, being the purchaser of a part thereof, and Lindsay being the purchaser of the balance. On March 28, 1881, plaintiffs in error caused notice to be personally served on Lindsay, that on April 5, 1881 (that being the first day of the April term of court), at ten o'clock A. M., they would apply to the court for an order setting aside the judgment and letting them in to defend for the reason that the judgment had been rendered without any other service than by publication in a newspaper, and that they had had no actual notice of the suit in time to appear and defend. This notice, with proof of service, the affidavit required by sec. 77 of the Code, and a full answer to the petition were all filed on said April 5th. Thereupon the motion to open up the judgment and to allow defendants below to be let in to defend was called up at the first call of the docket on April 5, 1881, and Lindsay also called up the motion to confirm the sale. Thereupon the attorneys for Lindsay stated in open court, that they desired to resist the motion to vacate the judgment, and wanted time to prepare and read counter affidavits, and thereupon the matter went over. On April 11, 1881, the case was called, and the Johnsons said they were ready with their motion to vacate. The attorneys for the defendant in error, H. Lodge, said they were ready with a motion to confirm the sale of the land. The Johnsons objected to any confirmation of the sale until their motion to vacate could be heard, and asked that the motion to vacate be heard first. The attorneys of Lindsay and Lodge objected and made application with affidavit in support thereof for the continuance of the motion to vacate. The court stated that it would pass upon the motion to confirm first, and refused to consider at the time the motion to vacate. The Johnsons made several objections to the confirmation of the sale, but the court overruled the objections and confirmed such sale; and thereupon the court took the motion to vacate under advisement until the next term of the court, and gave Lindsay forty days in which to file counter affidavits in opposition to the affidavit to obtain a vacation of the judgment.

The action of the court below in disposing of the motion for confirmation, and confirming the sale before rendering a decision upon the motion to vacate the judgment, was, under the circumstances of this case, grossly unjust to the plaintiffs in error against whom the judgment had been rendered. By the terms of said sec. 77 of the Code, the title to any property the subject of the judgment sought to be opened, which, by it or in consequence of it, shall have passed to a purchaser in good faith, is not affected by any vacation of the judgment. Therefore a confirmation of sale made pending a motion to open up the judgment and permit a defendant to defend, may deprive a defendant of all the substantial benefits of said section. While the confirmation of a sale relates back to the date of such sale, the proceedings under an execution, or order of sale, are *in fieri*, and not perfected until the court has examined the proceedings and directed the clerk to make an entry on the journal that the court is satisfied with the legality of the sale and orders the officer to make to the purchaser a deed for the lands and tenements so sold. The officer making the sale retains the purchase money in his hands until the court confirms the proceedings, and no title passes to the purchaser without the order of confirmation, and, until such confirmation, the sale is not legally consummated so as to entitle the purchaser to a conveyance thereof, and to vest in him a title.

Before the confirmation, the title to the property ordered sold under the judgment had not passed to the purchaser thereof, and pending the motion to vacate the judgment, the court ought not to have attempted to have passed the title of any part of the property so that it would have been beyond the reach of being affected by the vacation of the judgment. The property had been seized upon attachment under the provisions of the statute, requiring no bond of indemnification in the event that the attachment had been wrongfully sued out; the service was had by publication, and within a very brief time that the proper proceedings were commenced to have the judgment opened up. Now, as the title to the property had not passed to the purchaser when this motion was called for hearing, the court should have disposed of the motion before confirming the sale. In view of the extrinsic circumstances presented to the court at the time the motion of confirmation was called up, neither Lindsay nor Lodge had any absolute right to have the confirmation then made. The court ought not to allow itself to be made the instrument of oppression or fraud, and if it should appear upon the trial of the case upon its merits that the plaintiffs below had no cause of action, and the con-

firmation is permitted to stand, such confirmation might deprive defendants below of all their property without any recourse. Howard v. Entreken, 24 Kan. 428; Dewey v. Linscott, 20 Kan. 684; Company v. Smith, 25 Kan. 622. The proceedings upon the sale should have stopped until the motion for the vacation of the judgment had been decided. If the court had ordered the judgment opened up, then the proceedings subsequent to the judgment, including the sale, should have been set aside.

The order of the district court confirming the sale will be reversed and the case remanded with instructions to defer any action upon the motion to confirm until the motion to have the judgment opened up is disposed of.

All the justices concurring.

CONTINUANCE — ADMISSION THAT ABSENT WITNESSES WOULD TESTIFY TO FACTS SET OUT— EVIDENCE — CONFESSIONS.

STATE v. UNDERWOOD.

Supreme Court of Missouri, March, 1882.

1. Where the prosecuting attorney has prevented a continuance by consenting that the facts set out in the application therefor shall be received as the testimony of the absent witnesses (R. S., 1866), and the court has given the usual instruction as to the credibility of witnesses, a specific instruction to the effect that the testimony of the absent witnesses are to be taken and received by the jury as the testimony of such persons were they present, and that the jury is the sole judge of their credibility, and the weight to be given to their testimony is erroneous, because it makes a distinction between the testimony of witnesses who are present and testify and statutory testimony of the absent witnesses, as set forth in the application for the continuance, and calls the attention of the jury specifically thereto.

2. An instruction asked by the defendant to the effect that the facts set out in the application for the continuance, which the defendant expected to be able to prove by the absent witnesses, are to be taken and received by the jury as the testimony of such witnesses, and are entitled to the same weight as if such absent witnesses had been sworn and given their evidence on the trial, was proper, and the court committed error in refusing it.

3. Where, in the same conversation, in which the accused admits the commission of the crime with which he is charged, he likewise makes admissions of another crime, it is proper and competent to give in evidence the whole conversation.

4. A deputy constable is authorized to arrest without warrant, if he has reasonable cause to suspect that a felony has been committed by the person whom he arrests.

5. Although such officer has no authority to make the arrest, and his official character is unknown, yet the party sought to be arrested has no right to kill him, unless the killing is apparently necessary to save his life.

Indictment for murder in the first degree, the defendant having killed McElrath, the deceased, who was a deputy constable, in attempting his arrest for a felony.

The 21st instruction spoken of in the opinion as having been asked by the defendant and refused by the court, was to the effect that the facts set out in the application for the continuance, which the defendant expected to be able to prove by the absent witnesses, should be taken and received by the jury as the testimony of such witnesses, and were entitled to the same weight as if such absent witnesses had been sworn and had given their evidence on the trial.

Attorney-General McIntyre, for the State; *E. F. Buler* and *W. C. Robinson*, for appellant.

SHERWOOD, C. J., delivered the opinion of the court:

The defendant, indicted in the County of Dade for murder in the first degree, was on change of venue to the Circuit Court of the County of Barton, convicted of that offense, and now appeals to this court.

1. There was no error in denying the defendant's motion to strike the cause from the trial docket, based upon the reason that the cause coming by change of venue from another county, and the transcript being filed less than fifteen days before the first day of the term, that the cause was not triable at such term. The motion had the support of Rule 12 of the Barton Circuit Court, but that rule is in direct conflict with sec. 1870, Rev. Stat. 1879, which provides that, upon a transcript from another county being filed in the court to which the venue has been changed, that "the same proceedings shall be had in the cause in such court in the same manner, and in all respects, as if the same had originated therein," and the statute must prevail.

2. Nor was error committed in denying defendant's application for a continuance. The prosecuting attorney, under the provisions of the statute (section 1886), having consented that the absent witnesses would, if present, testify as stated in the defendant's application. State v. Hatfield, 72 Mo. 518; State v. Miller, 67 Mo. 604. That section provides that, upon such consent being given, "the facts set out in the application, or affidavit, as the facts which the party asking the continuance expects to prove by the absent witness, shall be taken as and for the testimony of such witness, the trial shall not be postponed for that cause, but the facts thus set out shall be read on the trial, and be taken and received by the court, or jury, trying the cause, as the testimony of the absent witness, but such facts may be contradicted by other evidence; and the general reputation of such witness may be impeached, as in the case of other witnesses who testify orally or by deposition." This statutory provision, so far as concerns criminal cases, was designed as substitutionary for that constitutional provision which allows the accused "to have pro-

cess to compel the attendance of witnesses in his behalf." Art. 2, sec. 22.

When section 1886, *supra*, was first called to our attention, we had grave doubts touching its constitutionality. Taken at its best, the section is but a sorry substitute for compulsory process, and it may well admit of serious doubt whether, as a matter of strict constitutional law, a party accused of crime can be compelled to forego the benefits arising from having the personal presence and oral testimony of his witnesses, provided the prosecuting attorney will consent that the absent witness would, if present, testify in the manner stated.

But waiving the further consideration of the constitutional point, the statute expressly says that the facts thus set out shall be read on the trial, and shall be received by the court, or jury, trying the cause as the testimony of the absent witness. There can be no other rational construction placed on this language but that it was intended to place the statement of facts thus set forth in the application for continuance on precisely the same footing, to all intents and purposes, as though the absent witness had been personally present and testified.

And it was because we took this view of the matter on former occasions that we upheld the validity of the statute; we are thus brought to a consideration of the 15th instruction, given at the instance of the State as follows: "The court instructs the jury that the statements read in evidence as the testimony of C. R. Turner and John Doe, whose real name is unknown, are to be taken and received by the jury as the testimony of such persons were they present, and that the jury are the sole judges of their credibility, and of the weight to be given to their testimony."

The court, at the request of the prosecuting attorney, had previously given instruction number 9, which is the usual one given in regard to the credibility of witnesses, and so that instruction 15, above quoted, was entirely unnecessary, unless it can be safely said that it is proper to draw a distinction between the testimony of witnesses who are present and testify, and statutory testimony of the absent witnesses as set forth in an application for a continuance.

We are of opinion that neither the letter nor the reason and spirit of the statute under discussion will admit of any such distinction, and still less admits of such distinction being pointedly called to the attention of the jury, as we think was done in the instruction referred to. On retiring to consider of their verdict, the jury could not fail to be impressed with the line of demarcation thus drawn between the testimony of the witnesses present and that of those absent, or what is tantamount thereto, its lawful equivalent and legal substitute. Such distinction, violative alike of the statute and of the reasons upon which it is founded, can not receive our sanction. We went to the extreme verge of the Constitution in upholding the constitutionality of the statute, and having gone so ar, we are unwilling to go still further, and by a f loose construction fritter away the doubtful and substitutionary benefits that statute confers, and whatever of slender protection to the rights of the accused it affords. For these reasons we think there was error in giving instruction No. 15 on the part of the State, and in refusing instruction No. 21 asked for defendant, as the latter, in our opinion, correctly embodies that which the legislature intended to be the effects of the statute we have discussed.

3. In regard to the admission of evidence concerning the marks on the pistol, etc., there was no error in admitting it. True, as a general rule, that on the trial of one accused of crime, evidence of other crimes committed by him is inadmissible. State v. Martin (decided at present term), and cases cited. But where the testimony relates to a conversation of the accused, wherein he admits the commission of a homicide with which he is charged, and also in the same conversation makes admissions of another crime, it is proper and competent to give in evidence the whole conversation. State v. Carlisle, 57 Mo. 102; Barb. Cr. Law, 463; Rex v. Clewes, 4 Car. & Payne, 221; 1 Greenl. Ev., sec. 218. And besides, in the case at bar, it was impossible to separate that portion of the conversation of the prisoner relating to the particular offense from that portion of the conversation relating to another offense.

4. The testimony of Murphy was properly excluded. If introduced as offered it would only have shown an attempt to take away from the custody of the officers of the law Mitchell and Butler, arrested for stealing horses, but would not have shown anything at all implicating McElrath in such attempt. State v. Estes, 70 Mo. 438. And it was upon this express ground that the court made a ruling of which complaint is made. There was no error in it.

5. The appointment of McElrath as deputy constable was valid, notwithstanding the appointment had not been filed as required by law. His appointment was in writing; he had taken the oath of office, and for five or six months had been serving process, both civil and criminal, in the township where appointed. The only object the law has in requiring the appointments to be filed in the office of the clerk of the county court (sec. 652 Rev. Stat. 1879), is to preserve record evidence of the fact of such appointment having been made. But the fact that McElrath was the marshal of the city of Greenfield gave him no authority to make the arrest without warrant. This point is controlled by the statute, sec. 4998. His authority, however, as deputy constable, was sufficient to authorize the arrest without warrant, if he had reasonable cause to suspect that a felony had been committed by the defendant. Blackstone says, when speaking of a constable: "He may, without warrant, * * * * in case of felony actually committed, * * * * upon probable suspicion, arrest the felon." 4. Com. 292.

Shaw, C. J., in Commonwealth v. Carey, 12 Cush. 246, thus states the rule applicable to such

cases: "If a constable or other peace officer arrest a person without warrant, he is not bound to show in his justification a felony actually committed to render the arrest lawful; but if he suspects one on his own knowledge of facts, or on facts communicated to him by others, and thereupon he has reasonable ground to believe that the accused has been guilty of felony, the arrest is not unlawful." In that case the accused, after being arrested, in the endeavor to make his escape killed the officer, and the offense was ruled to be manslaughter only; but it was also ruled that if the offense charged in the letter written to the officer to make the arrest, had set forth facts constituting a felony, the offense would have been murder. Mr. Bishop, when speaking of arrest without warrant, says: "Where it is a felony and is past, * * * * the officer is justified, though no offense had been committed; * * * yet must have had reasonable cause to suspect the one apprehended." 1 Bish. Crim. Prac., sec. 188. Upon an examination of all the facts disclosed by this record, we can not say but that McElrath had reasonable ground authorizing him to act as he did.

6. But even granting that McElrath had no authority to make the arrest, if the testimony on the part of the State is to be credited, the defendant was not justified in shooting him, as according to that testimony McElrath had used no force, and attempted no physical restraint of the defendant; had simply announced his intention to make the arrest, when the fatal shot was fired. So that even if the official character of McElrath was unknown to defendant, yet if the testimony offered on the part of the State as to what occurred in the saloon is to be regarded as true, the killing of McElrath is wholly inexcusable. Mr. Wharton lays down the rule that if the defendant slay an officer of whose official character he has no notice, this is homicide in self-defense, if the killing was apparently necessary to save the defendant's life. 1 Cr. Law, sec. 419. Now if the facts were as stated by the State's witnesses, there was no apparent necessity for the homicidal act, and consequently no excuse therefor.

7. But the testimony on the part of the defendant placed the matter in quite a different light, showing that McElrath did more than merely announce his intention of making the arrest, according to the testimony which, so far as the instructions are concerned, is to be taken as true. McElrath spoke to defendant in a threatening manner, and attempted to draw his pistol, crying out to Long, who stood in the door with a pistol in his hand, "Shoot him, Bob," and it was no doubt upon this theory that the court gave instruction 11 on behalf of defendant. That instruction is undoubtedly correct in that view of the case.

8. And we are inclined to the opinion that an instruction should have been given also on behalf of the defendant in relation to his knowledge of the official character of McElrath when attempting the arrest (1 Wharton on Crim. Law, sec. 419), as that element appears to have been omitted from the instructions which are given.

This cause was, in the main, well tried, and in view of the fact that it must be retried, we make no further comments, but for the error committed in giving instruction No. 15 aforesaid, and in refusing instruction No. 21 asked by defendant, we reverse the judgment and remand the cause. All concur.

WEEKLY DIGEST OF RECENT CASES.

ADVERSE POSSESSION—OUSTER OF CO-TENANT.

To effect the ouster of a co-tenant, where no explicit notice of the denial of his right is given, the occupant must make his possession so visibly hostile and notorious, and so apparently exclusive and adverse as to justify an inference of knowledge on the part of such co-tenant, and of laches if he fails to discover and assert his rights. *Culver v. Rhodes*, N. Y. Ct. App., January 17, 1882.

CONTRACT—BANKRUPT'S NEW PROMISE.

A promise made by a debtor, after the filing of his petition in bankruptcy, but before his discharge, to pay an existing debt, is enforceable, if supported by a valuable consideration, whether adequate or not. *Thornberg v. Dils*, Ky. Ct. App., April 18, 1882.

CONTRACT — IMMORAL CONSIDERATION — SEXUAL INTERCOURSE.

The violation of the marriage obligations by a married woman by committing adultery, and becoming pregnant by one not her husband, under an alleged promise of marriage, can not be made the foundation for a consideration to support a promise by her seducer to make a will giving her and the child all his property, and a court of equity will not specifically enforce such an agreement, even if such an agreement, founded on a proper consideration, is enforceable. *Drennan v. Douglas*, S. C. Ill., March 28, 1882.

CONTRACT—CONSIDERATION.

A promise to pay a debt, after it has been voluntarily released by the creditor, is not supported by a sufficient legal consideration. *Ingersol v. Martin*, Md. Ct App.

CONTRACT — CONVEYANCE OF LAND — MISTAKE — QUANTITY A MATERIAL ELEMENT.

Plaintiff purchased of defendants a farm which they stated contained 222 acres. After entering into possession he found it only contained about 206. It appeared that both parties were mistaken as to the quantity of land. *Held*, that quantity being an essential element in the contract, it must be presumed that the price was fixed with reference to it; that notwithstanding the words "more or less" in the deed, and the fact that the deed had been executed and delivered, and plaintiff had entered into possession, the discrepancy in quantity being considerable and material, plaintiff was entitled to relief by recovering back so much of the price as was computed and paid by mistake. *Paine v. Upton*, N. Y. Ct. App., January 17, 1882.

CONTRACT—GUARANTY—CONSTRUCTION AND SCOPE

A written instrument executed and delivered to a bank, whereby defendant promises and guaran-

ties to said bank all pledges of property, warehouse receipts and other vouchers that may be given by W as collateral security, and promises that the property so set over shall not be misapplied, and that if any default or misappropriation thereof shall be made, defendant will make good any deficiency and fully satisfy the stipulation in receipts, renders defendant liable only to make good a deficiency caused by diversion of property actually pledged and not money loaned. *Farmer's & Mechanic's Kank v. Lang*, N. Y. Ct. App. Dec. 13, 1881.

CONVEYANCE—WHAT CONSTITUTES A DELIVERY OF A DEED—HUSBAND AND WIFE.

Where a deed was made and acknowledged by a husband and wife, for lands of the wife, and placed by the wife in the husband's hands, leaving him to determine when, if ever, it should be delivered, and he failed to exercise that discretion in his wife's lifetime, and the wife, after the date of the deed, built a large house on the premises, in which she and her husband resided until after her death, after which he passed over the deed to the grantee: *Held*, that the deed never took effect for want of delivery in the lifetime of the wife, and that upon her death his authority to deliver was revoked. *Benneson v. Aiken*, S. C. Ill., March 28, 1882.

CRIMINAL LAW—HOMICIDE—EVIDENCE OF INSANITY—BURDEN OF PROOF.

Where the defense of insanity is interposed, the burden of proof as to whether the acts complained of were committed by the prisoner, and whether he was at the time in such condition of mind as to be responsible for them is upon the prosecutor. He is bound to satisfy the jury on the whole evidence that the prisoner was mentally responsible, as he has the affirmative of the issue to the end of the trial. *People v. O'Conner*, N. Y. Ct. App., January 17, 1882.

DAMAGES — DISTINCTION BETWEEN LIQUIDATED DAMAGES AND PENALTY.

Where in consideration of a right of way for a railroad company, such company covenanted that it would construct a lawful fence on each side of the railroad track, and a crossing with cattle guards on each of the eighty acres of the land described in the agreement at such places as the owner of the land should designate, or in default thereof would forfeit and pay to the owner of the premises $1,000: *Held*, that the sum of $1,000 must be construed as a penalty, and on default that the owner is entitled to recover his actual damages only. *St. Louis, etc. R. Co. v. Shoemaker*, S. C. Kan., May 9, 1882.

DIVORCE—ALIMONY—LANDS IN FEE.

Where the wife brings no means into the marriage, and derives none by inheritance afterwards, but the property accumulated is made through the husband, it is not proper, on granting the wife a divorce, to give her part of the husband's real estate in fee. In such case the court should inquire into the condition, necessities and resources and income of the parties, respectively, and direct, for the time being, the custody and use of the homestead and household goods as may seem just and proper, and fix such alimony, to be paid from time to time, as the proofs may show to be fitting, and within the power of the defendant to pay. It seems that such alimony should not exceed one-half of the husband's income. *Wilson v Wilson*, S. C. Ill., March 28, 1882.

EVIDENCE—COMPETENCY OF WITNESS—LACK OF RELIGIOUS BELIEF.

Although there is no provision in the Criminal Code, as there is in the Civil Code, which changes the common law rule, and makes competent as witnesses all persons so far as any religious belief is concerned, yet the common law rule on that subject has been changed by our Constitution, and an atheist in criminal as well as in civil cases, is competent to testify, and his want of religious belief can not be inquired into for the purpose of affecting his credibility. *Bush v. Commonwealth*, Ky. Ct. App., April 21, 1882.

EVIDENCE — COMPETENCY — TRANSACTIONS WITH DECEASED PERSONS.

The principal maker of a promissory note is a competent witness in a suit thereon against the administrator of a deceased surety alone, to prove its execution by the intestate. In such case the witness is not a party to the suit, and his interest is equally balanced, and his testimony is not given on his own motion, or in his own behalf. *Sconce v. Henderson*, S. C. Ill., March 28, 1882.

GARNISHMENT — OBLIGATIONS WITHIN THE PROCESS.

Garnishee proceedings reach only to those debts which, whether due or not, are owing by the garnishee to the debtor at the time of the service of the garnishee process, and where, after the service of such process, new and independent contracts are entered into between the garnishee and the debtor, out of which arise liabilities from the former to the latter, such liabilities, although fixed before the answer day, are not within the scope of or affected by the prior garnishee process. *Phelps v. Atchison, etc. R. Co.*, S. C. Kan., May 9, 1882.

HOMESTEAD—SURRENDER OF POSSESSION.

Where the owner of a homestead of less value than $1,000, after its sale under execution against him, and before the taking out of a sheriff's deed, let the assignee of the certificate of purchase into possession of one of the houses upon the premises, under an agreement that the assignee should take care of and maintain him during his life, and then have the property, which contract the assignee denied, and refused to maintain the occupant: *Held*, that this was not such a surrender of the possession as to make the sheriff's deed valid, or prevent the occupant from having the sale and deed set aside. *Barrett v. Wilson*, S. C. Ill., March 28, 1882.

HUSBAND AND WIFE—CURTESY—SEPARATE ESTATE.

Where property is conveyed to a trustee for the sole and separate use of the wife, the trustee covenanting that he will convey it in accordance with her wish expressed in writing, and the trustee does, in pursuance of her wish so expressed, convey, after her death, to her daughter: *Held*, that her husband is entitled to curtesy. *Tremmel v. Kleiboldt*, S. C. Mo., May 8, 1882.

INSURANCE, FIRE—PAYMENT OF PREMIUM, WITH NOTE—LOSS—NOTE OVERDUE AND UNPAID.

A policy of insurance having been delivered without the payment of the premium upon the receipt of a note for the amount, and the same being overdue and unpaid a reasonable time before a loss, the company cancelled the policy. *Held*, 1. That by delivering the policy without actual payment of the premium, and by taking a note of the assured for the same, the company waived the condition that the policy was not binding unless the premium was actually paid. 2. On failure of the as-

sured to pay the note, the company might, on giving reasonable notice thereof before the loss, exercise its option to cancel the policy. 3. As the note was past due and in the hands of the company at the time of such cancellation, it was not necessary to tender back the *pro rata* proportion of the unearned premium in cash, nor to credit the same on the note. The note was thereafter subject to such credit. *Little v. Eureka Fire and Marine Ins. Co.*, S. C. Ohio, April 25, 1882.

INSURANCE — MISREPRESENTATIONS IN APPLICATION.

Representations of an applicant for insurance, which did not affect the risk, and which could not have influenced the action of either party in making the contract, although untrue, will not forfeit the policy, if made in good faith, even though the representations be made a part of the contract, and it provides that the policy shall cease if they be found in any respect untrue. *Germania Life Ins. Co. v. Rudwig*, Ky. Ct. App., April 13, 1882

JUDGMENT—ASSIGNMENT AFTER PAYMENT.

The complaint of the appellees shows that Green recovered a judgment against Ewing and Shields, part of which was paid by Ewing; that afterwards Shields paid the balance, and two months after such payment procured Green to assign the judgment to Fields' wife, who was claiming an interest in certain real estate of the appellees upon which said judgment was a lien. It does not appear that the assignment to the wife of Fields was made pursuant to any agreement entered into between Green and Fields at the time the latter paid the balance of the judgment, or that the judgment showed that Ewing was principal and Fields surety in the judgment debt. Under these circumstances the judgment became *functus officio* when it was paid off, and the assignment to Mrs. Fields passed nothing. *Shields v. Moore*, S. C. Ind., May 11, 1882.

MARRIED WOMAN — RESCISSION OF DEED — IMPROVEMENTS.

Where a party has entered upon land under a deed from a married woman, in which her husband did not unite, under the mistaken belief that it was not necessary for the husband to unite in the deed, and has erected valuable improvements, upon a rescission of the contract and cancellation of the deed he is entitled to pay for his improvements to the extent they have enhanced the vendible value of the land, and should be charged with rent, to be regulated by the interest on the consideration and prime cost of the improvements. *Hawkins v. Brown*, Ky. Ct. App., March 30, 1882.

NEGLIGENCE—MASTER'S LIABILITY FOR SERVANT'S NEGLIGENCE—SCOPE OF DUTY.

Defendant was owner of a ferry boat, which had formerly been engaged in towing canal boats ashore from tows, but had been replaced in that business by another boat of his. A person on the shore, who desired to get on a boat then in a tow in the river, was invited by the pilot of the ferry boat to get on board, and as a matter of favor and without compensation was placed on the tow, the ferry boat, in so doing, deviating from her course. A collision occurred between the ferry boat and the tow, by which plaintiff's intestate was thrown overboard and drowned. *Held*, that defendant's servant's were acting within the scope of their employment, and he was liable for their negligence, if any existed. *Quinn v. Power*, N. Y. Ct. App., January 24, 1882.

SERVICE OF PROCESS—NON-RESIDENT—PRIVILEGE.

Defendant, a non-resident, came to this State to attend a meeting of creditors before a register in bankruptcy, as a creditor and witness, and to present proof of claims of other parties. The summons herein was served upon him before he had time to finish his business and leave the office of the register. *Held*, that even if he was in attendance only as a party and attorney for other parties, he was privileged from service; and that on motion to set aside such service the validity of his claims as creditor could not be tried. *Matthews v. Tufts*, N. Y. Ct. App., January 31, 1882.

STATUTE OF FRAUDS—CONTRACT TO CONVEY LANDS—PAROL EVIDENCE.

The question presented is, whether or not the following contract is within the statute of frauds: "The parties of the first part, having this day conveyed certain lands situated in Shelby township, Shelby county, Indiana, in part, agree to have the same completed within twenty days," etc. If there is no description of the land agreed to be conveyed, the contract can not be enforced. Recourse can not be had to parol evidence to supply a description of the land intended. It is not necessary that the description be contained in one of a series of instruments. If, taking all the series together, the description appears, it will be sufficient. *Puse v. Miller*, S. C. Ind., May 10, 1882.

SURETY—ON NEGOTIABLE PAPER—FAILURE OF HOLDER TO ENFORCE SECURITY.

Where the holder of negotiable paper who has a lien on personal property for security, fails to enforce his lien until the security is lost, such failure can not be set up in defense by a surety or guarantor. *Fuller v. Tomlinson*, S. C. Iowa, April 19, 1882.

VENDOR'S LIEN—COLLATERAL SECURITY.

Taking a collateral security for the purchase money of land will amount to a waiver of the lien by the vendor, unless it is clearly shown that the intention was to reserve the lien. And an innocent purchaser of such land can not suffer in consequence of a failure of the original vendor to realize out of the collateral security the sum it was intended to secure, whether said security be forged or otherwise defective. *Brown v. Barret*, S. C. Mo., May 8, 1882.

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

52. C was arrested on a complaint made before a justice of the peace, charged with drunkenness. On the trial of the case, the constitutionality of the law upon which the complaint and warrant were based, was called in question by counsel for defendant. The justice of the peace held the law to be constitutional, the defendant was tried and acquitted by a jury. Since the trial of C, and in a different case, the Su-

preme Court have held the said law under which C was arrested to be unconstitutional. Is the justice of the peace liable for false imprisonment? R. A. L.
Salina, Kan.

53. A executes note Dec. 13, 1881, to B, in which he promises to pay one year after date, "one thousand gold dollars," at 6 per cent. interest. 1. Can A compel B to pay in gold, and refuse payment of any other kind of money? 2. If so, can he (A) compel B to pay interest in gold? Note executed in United States.
Vincennes, Ind. L. P. W.

54. A, in 1780 or '83, sold real estate in the City of Baltimore, Md., but his wife, B, did not sign the deed. Property is very valuable. Have the heirs of B any claim? Under what law was conveyance made, common law of England or statutory of Maryland? What recourse have heirs of B? W.
Vincennes, Ind.

NOTES.

——While Judge T. M. Cooley, of Michigan, was in St. Louis last week as a member of the Railway Commission, he called one morning on his old friend, Dr. W. G. Hammond, of the St. Louis Law School, and found him just closing one of his lectures on the history of the common law, to the usual audience of members of both classes, with a few gentlemen of the city bar, who have attended these lectures throughout. After closing his lecture, the dean introduced his distinguished guest by name, saying that he could not forego the pleasure of making known to them one whose name they, and all law students, knew so well and held in such high respect, though he owed an opology to Judge Cooley for doing it without a word of warning. In response to the instant and hearty welcome which followed the mention of his name, Judge Cooley made a brief but most appropriate speech, a copy of which we owe to one of the students, who took it down in his notes as delivered: "Now, young gentlemen, inasmuch as your worthy dean here has not asked me imperatively to make a speech, I do not know but it would be a favor to me to make one before you and your dean, who is able to make so much better speeches to you. It is a matter of accident rather than otherwise that I am here this morning, but it is always a pleasure to me to be present where young men are engaged in their studies, and it is especially a matter of enjoyment to me when young men are engaged in the study of the law. It has always seemed to me to be the highest of all our purely secular studies, and, although when I started out in life I made one vow to myself, and that was, that of all things, whatever else might happen to me I would never be a school teacher, still when I came to be better acquainted with young men, their troubles and trials in acquiring knowledge, and the necessity of putting them an the right road of acquiring it, it became a pleasure to be a school teacher, and I have been one all my lifetime. So that I have been devoting all my existence to precisely the thing which, at the outset, I promised myself not to do at all. But, as I said, it has been a pleasure to me, and had I known that I would be called upon at this time, and known of your recitation and lecture hours, I would have prepared myself to say something that would have been of the utmost interest and pleasure to you young gentlemen. I suppose your dean here has long before this instructed you that the principal thing in giving instruction in the law is to teach young men how best to employ their reasoning faculties, how to think, and that is the main thing in the law. It is not so much what is in the books, or that a particular court has decided so and so. It is not even the facility of bringing together the decisions that have been made from time to time with a view to learning them. With respect to them, though, of course that facility is worth a great deal to us; but I often think that it is a facility that is unfortunate in that it teaches us to rely too much on what courts have said and decided, instead of endeavoring to get right down to the reason of things, upon which all judicial decisions, if they be of any value, must always rest. And now, I believe that the main thing that is to be taught schools or in lawyers' offices where young men are trained, when they receive any valuable training at all, is to reach the reason of things that underlie the rules of law that are laid down for our guidance, and that the most unfortunate thing that can ever happen to a young man, as he starts out to fit himself for the profession of the law, is to learn to rely upon rules without reaching under those rules to see upon what they are based. And now if, standing here for the moment to look into these eager faces, I can impress that one idea upon you, that you should give your principal time, thought and attention, while you are in this law school, or while engaged in the practice of the law, to reaching the reasons that underlie the law, it will give me great pleasure to have been here; to have the time come at some day when you shall be in successful practice, that you will remember that at an early day in your career, I said that word to you, "reason." It is a great pleasure to me to be with your worthy dean here in this school, and it will be a great pleasure to me to hear afterwards of the classes of those whom he has assisted in training."